JD–107–04
Dayton, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CARRIAGE INN OF DAYTON

and

Cases 9–CA–40909
9–CA–40913

DISTRICT 1199, THE HEALTH CARE AND
SOCIAL SERVICE UNION, SEIU, AFL–CIO

Patricia Rossner Fry, Esq., for the General Counsel.
Kenneth Bernsen, Esq., of Dayton, Ohio, for the Respondent.
Lisa Hetrick, (Secretary-Treasurer), of Columbus, Ohio,
for the Union.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on August 3, 2004. The charge in Case 9–CA–40909 and Case 9–CA–40913 was filed February 26, 2004, and the amended consolidated complaint was issued June 22, 2004, together with an order consolidating cases and notice of hearing.

The complaint alleges that Carriage Inn of Dayton (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening to discharge an employee if the employee discussed staffing changes with other employees. The complaint also alleges that the Respondent violated Section 8(a)(5) of the Act by implementing a new health care plan, a mandatory subject of bargaining, without prior notice to District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO (the Union), and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

On the entire record, including my observation of the demeanor of the witnesses, and where demeanor is not determinative, on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the counsel for the General Counsel and the Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a nursing home at Dayton, Ohio. During a 12-month period ending June 22, 2004, the Respondent in conducting its business operations, derived gross revenues in excess of $100,000. During that same time period the Respondent purchased and received at its Dayton, Ohio facility goods valued in excess of $50,000 directly from points located outside the State of Ohio. The Respondent admits and I find that it is an

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Approximately 100 employees are employed at the Respondent's skilled nursing facility. Christine (Coldiron) Boykin is the Respondent's assistant director of nursing. (Boykin is identified as Boykins in the complaint.) The Union was certified[1] as the representative of the Respondent's non-professional service and maintenance employees on June 2, 2003[2]. The Union's secretary-treasurer, Lisa Hetrick, is the chief negotiator for the unit employees in negotiations for the initial collective-bargaining agreement. Kenneth Bernsen, Respondent's in-house attorney, is her counterpart. Negotiations were ongoing during the hearing.

A decline in the patient census caused the Respondent to make various staffing changes in the Restorative Department. Boykin choose to tell the employees of the changes individually. The conversations occurred on February 5, 2004.

B. The Section 8(a)(1) Allegation

Paragraph 5 of the amended consolidated complaint alleges that about February 5, 2004, Boykin threatened to discharge an employee if the employee discussed staffing changes with other employees. In support of this allegation counsel for the General Counsel presented employee Warennita Melendez. Melendez testified that she was summoned to Boykin's office where Boykin explained the pending staffing changes, and told her that she "was not supposed to talk to the other girls in my department or other co-workers about what she had told me in her office." I fully credit Melendez' testimony which Boykin did not refute.

Boykin stated that she told the aides to "please keep what we talk about confidential when they were working on the floor and working with the residents." The Respondent contends that Melendez testified only that she *believed* she could not talk about staffing. The Respondent suggests that what is at issue is a misunderstanding or a matter of interpretation. Melendez did not testify as to her belief. Melendez clearly and convincingly testified, without doubt or hesitation, as to what she was told by Boykin and her testimony was not refuted.

It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act because they tend to inhibit employees from engaging in otherwise protected activity. See e.g., *Phoenix Transit System,* 337 NLRB 510 (2002); *Universal Medical Center,* 335 NLRB 1318, 1322 (2001); *Iris U.S.A., Inc.,* 336 NLRB 1013 (2001); *Flamingo Hilton-Laughlin,* 330 NLRB 287, 288 (1999); see also *Safeway, Inc.,* 338 NLRB No. 63, slip op. at 3 fn. 6 (2002) (where a panel majority, although finding *Iris U.S.A.* and *Flamingo Hilton-Laughlin* distinguishable, stressed that the confidentiality rule in issue did not "expressly prohibit employees from discussing terms and conditions of employment with each other or with the Union").

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[1] The unit description contained in the complaint was corrected at the hearing to specify that "office clerical employees" were excluded from the unit.

[2] All dates are 2003 unless otherwise indicated.

I also reject the Respondent's argument that Boykin's statement comes within the Board's special rules regarding solicitation in certain "patient care areas" of health care facilities. *NLRB v. Baptist Hospital,* 442 U.S. 773 (1979); *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978). Boykin admitted that she admonished all the aides not to discuss the staffing changes when they were working "on the floor." She further admitted that there were areas on the floor where residents were not present, and times when aides were working on the floor, but residents were not present. Thus, even if the rules regarding solicitation in health care facilities are applicable, Boykin's statement was not "narrowly tailored in order to avoid unnecessarily depriving employees of the Section 7 rights (footnote omitted)." See *Lockheed Martin Astronautics,* 330 NLRB 422, 423 (2000). Nor does the evidence justify any restriction as necessary to maintain production or discipline. See *Brandeis Machinery and Supply Company,* 342 NLRB No. 46 (2004). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge employee Melendez if she discussed staffing changes with other employees.

C. The Section 8(a)(5) Allegation

Paragraph 9 of the amended consolidated complaint alleges that the Respondent, about October 30, 2003, implemented a new health care plan, a mandatory subject of bargaining, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the implementation and the effects thereof.

It is undisputed that the Respondent, effective December 1, 2003, changed its health care plan from the Anthem Blue Cross Blue Shield plan to a self insured plan administered by Underwriters Safety and Claims. The Respondent contends that bargaining occurred and that the Union agree to accept the new health care plan. Counsel for the General Counsel contends that there was no agreement and that the Respondent simply notified the Union of its unilateral decision to change the health insurance available to unit employees.

In support of this contention counsel for the General Counsel presented Lisa Hetrick, secretary-treasurer and chief negotiator for the Union. Hetrick testified that the parties began negotiations on August 7, 2003. Kenneth Bernsen, the Respondent's attorney, represented the Respondent. At the initial meeting Hetrick gave Bernsen the Union's non-economic proposals and a copy of the SEIU's Health and Welfare Fund, which contained the details of the Union's health insurance plan. Hetrick also presented a comparison of the Union's plan with a plan similar to the Blue Cross plan then used by the Respondent. Hetrick credibly testified that as an experienced negotiator she has had to cost out and evaluate health care proposals. She recognized how difficult this can be, and that is why she gave Bernsen a copy of the Union's plan, as well as a comparison, well in advance of the actual bargaining. She told Bernsen that she intended to negotiate over the plan and that it was being presented in order to allow him adequate time for review.

The parties bargained and established a procedure for keeping track of tentatively agreed-upon proposals. Hetrick testified that after a proposal was tentatively agreed-upon it was typed and signed or initialed by the chief negotiators. Hetrick kept a current tally of the agreed-upon proposals, and placed them in a notebook (GC Exhs. 7 and 6).

Hetrick testified that during at the parties seventh negotiating session, on October 30, Bernsen stated that the Respondent was concerned about the rising cost of the Blue Cross plan and that it wanted to become "self insured" in order to contain the cost. Bernsen presented the Union with a 2-page outline of the new plan and a copy of a proposed letter to staff members

regarding the change. According to Hetrick, Bernsen concluded by stating that the Respondent would enter into the new plan on December 1. Hetrick replied that the Respondent's actions were inappropriate because the parties were still negotiating, that there had not been any meaningful discussion about health care in general, or the Union's proposal, which was still on the table. Hetrick repeatedly denied that she had agreed to the implementation of the Respondent's new health care plan.

Hetrick further testified that by letter dated November 21 she requested Bernsen to provide the Union with information necessary to bargain over the health insurance issue. She requested that the information be provided no later than December 15. A copy of the contract covering the new health plan was one of the requested items. The contract, which was not provided to the Union until March 2004, was executed December 1, 2003. It was also only after the new plan had been fully implemented that Bernsen informed Hetrick that the renewal date for the Blue Cross plan was not until June 2005. Bernsen also admitted that the Respondent had been exploring various health care options for at least 6 to 12 months before the change was made.

Bernsen, who represented the Respondent at the hearing, testified in narrative form. He stated that he became aware of the Respondent new health insurance plan on or about October 30. He said that he told Hetrick of the plan at the next negotiation meeting. He explained that because the quote for excess claims coverage was good for only 30 days the Respondent had to act quickly. He admitted that initially Hetrick wanted to discuss the Union's plan, but that after one or two meetings she said "well okay, go ahead, but at some time in the future, I want to revisit the SEIU plan." Bernsen submits that he "interpreted her to mean go ahead and offer that to the employees and that later we would revisit the SEIU plan." Bernsen admits to the absence of notes or a signed agreement to support his testimony.

I conclude, based on observing the demeanor of the witnesses, that Hetrick's recollection of the events is the most accurate. I also note that her testimony about the procedures for handling settled issues, is consistent with the documentary evidence (GC Exh. 6) and is not disputed by Bernsen. A troubling aspect of Bernsen's testimony is his statement that he did not think it necessary to reduce the alleged agreement regarding the new health care plan to writing. Considering that issues such as, the use of bulletin boards, change of employee status, and group meetings were put in writing and initialed by the parties, his statement borders on incredulity. Although Bernsen was not as experienced a negotiator as Hetrick he had negotiated collective-bargaining agreements. A written agreement at the very least, would do much to prevent misunderstandings, which is perhaps what occurred here. Regardless, I find Hetrick's testimony to be more reliable and I credit her denial that there was ever an agreement to implement the Respondent's new health care plan.

Based on the foregoing I find that there was no agreement between the parties to implement the Respondent's new health care plan. I further find that the Respondent's October 30, 2003, announcement of its implementation of its new health care plan on December 1, was made with no intention of changing its mind, and thus the Union was presented with nothing more than a fait accompli. *Ciba-Geigy Pharmaceutical Division,* 264 NLRB 1013, 1017 (1982). Accordingly, the Respondent's unilateral implementation of its new health care plan violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Carriage Inn of Dayton, has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discharge an employee if the employee discussed staffing changes with other employees the Respondent violated Section 8(a)(1) of the Act.

4 All full-time and regular part-time non-professional service and maintenance employees employed by the Employer at its 5040 Philadelphia Drive, Dayton, Ohio facility, but excluding all professional employees, all registered nurses, all technical employees, licensed practical nurses, physical therapy assistant, occupational therapy assistant, director of medical records, management employees, confidential employees, office clerical employees, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times since June 2, 2003, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate within the meaning of Section 9(a) of the Act.

6. By unilaterally implementing a new health care plan, a mandatory subject of bargaining, without affording the Union timely notice and a meaningful opportunity to bargain about the change the Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Counsel for the General Counsel submits that "[at] the time of the hearing, the parties were still engaged in negotiations for their first contract and the Union does not seek a return to the status quo ante of the previous Blue Cross Health insurance plan." Accordingly, I will not recommend the traditional affirmative remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Carriage Inn of Dayton, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge, or otherwise discipline employees, if they discuss staffing changes among themselves.

(b) Failing or refusing to bargain collectively and in good faith with District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO as the exclusive representative of its employees in the following appropriate unit, by unilaterally implementing a new health care plan, a mandatory subject of bargaining, without affording the Union timely notice and a meaningful opportunity to bargain about the change. The appropriate unit is:

> All full-time and regular part-time non-professional service and maintenance employees employed by the Employer at its 5040 Philadelphia Drive, Dayton, Ohio facility, but excluding all professional employees, all registered nurses, all technical employees, licensed practical nurses, physical therapy assistant, occupational therapy assistant, director of medical records, management employees, confidential employees, office clerical employees, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. October 27, 2004

John T. Clark
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten to discharge or otherwise discipline you if you discuss staffing changes among yourselves.

WE WILL NOT fail or refuse to bargain collectively and in good faith with District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO as the exclusive representative of the employees in the following appropriate unit, by unilaterally implementing a new health care plan, a mandatory subject of bargaining, without affording the Union timely notice and a meaningful opportunity to bargain about the change. The appropriate unit is:

All full-time and regular part-time non-professional service and maintenance employees employed by the Employer at its 5040 Philadelphia Drive, Dayton, Ohio facility, but excluding all professional employees, all registered nurses, all technical employees, licensed practical nurses, physical therapy assistant, occupational therapy assistant, director of medical records, management employees, confidential employees, clerical employees, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CARRIAGE INN OF DAYTON
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3663.